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IN THE

Supreme Court of the United States

James D. Lee,
Petitioner,

v.

Astoria Generating Company, L.P., et al.
Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF GRANTING WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF WITHOUT THE CONSENT OF ALL THE PARTIES

Now comes the Maritime Law Association of the United States ("MLA") and pursuant to Supreme Court Rule 37.2(b) moves this Court for leave to file a brief as *amicus curiae* without the consent of all of the parties.

The MLA is a voluntary, nationwide bar association founded in 1899, with a membership of approximately 3,000 attorneys, law professors, and other distinguished members of the maritime community. Its attorney members, most of whom are specialists in maritime law, represent virtually all maritime interests – ship owners, charterers, cargo owners, port authorities, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.

The Petitioner's legal representative has consented to the MLA filing an *amicus curiae* brief; however, none of the other parties have given their consent to the MLA to file an *amicus curiae* brief. Specifically, Respondents Astoria Generating Company, Orion Power New York GP, Inc., Orion Power New York, LP, Orion Power New York LP, LLC, Elliot Turbomachinery Co., Elliot Company, have not given consent to the MLA to file an *amicus curiae* brief. The MLA takes no position on the correctness or incorrectness of the opinion which Petitioner seeks this Court to review. The MLA wishes to submit the enclosed *amicus curiae* brief only to argue in favor of review. The MLA believes that this case presents substantial questions about the uniform application of the "vessel status" test and that this Court should grant certiorari to resolve

what is a conflict amongst the Circuit Courts of Appeals and various state courts.

No delay in the proceedings will result in the granting of this application and the MLA believes that the proposed *amicus curiae* brief will be of considerable help to the Court. Pursuant to Supreme Court Rule 37.2(b) the proposed *amicus curiae* brief is attached to this motion.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF GRANTING WRIT OF CERTIORARI

The Maritime Law Association of the United States (hereinafter "MLA") respectfully submits the following *amicus curiae* brief in support of the petition of James D. Lee for a writ of certiorari. The MLA takes no position on the correctness or incorrectness of the opinion which Petitioner seeks this Court to review. The MLA submits this

brief only to detail the issues that it believes warrant the attention of the Court and to argue in favor of review.[1]

Interest of *Amicus Curiae*

The MLA is a voluntary, nationwide bar association founded in 1899 and incorporated in 1993. The MLA has a membership of over 3,000 attorneys, law professors, and other distinguished members of the maritime community. The MLA is affiliated with the American Bar Association and it is represented in the ABA's House of Delegates.

The MLA's attorney members, most of whom are specialists in maritime law, represent virtually all

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* states that all Parties received timely notice of the intent to file this brief and the Petitioner has given written consent to the filing of this brief. However, none of the Respondents have given consent and this *amicus curiae* brief is submitted pursuant to Rule 37.2(b) as one document with the required motion for leave. Specifically, Respondents Astoria Generating Company, Orion Power New York GP, Inc., Orion Power New York, LP, Orion Power New York LP, LLC, Elliot Turbomachinery Co., and Elliot Company, have not given their consent to the MLA to file an *amicus curiae* brief.

maritime interests: ship owners, charterers, cargo owners, port authorities, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.

The MLA's purposes, as stated in its Articles of Incorporation, are:

> To advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices of different nations.

In an effort to promote these objectives, the MLA has sponsored legislation dealing with maritime matters and has cooperated with Congressional Committees in the formulation of legislation. The MLA also assists with international maritime

programs and initiatives alongside the United Nations, the International Maritime Organization and the Comité Maritime International. Consistent with its objective to promote uniformity in the interpretation of maritime law, the MLA has appeared as *amicus curiae* in numerous cases that have raised questions substantially affecting admiralty practice and jurisdiction. [2]

The MLA believes that this case presents substantial questions about the uniform application of the "vessel status" test and that this Court should grant certiorari to resolve what is a conflict amongst the Circuit Courts of Appeals and various state courts.

Summary of Argument

The New York Court of Appeals held that a floating barge containing an electricity generating turbine was a vessel under 33 U.S.C. § 905(b) of the Longshore and Harbor Workers' Compensation Act[3] ("LHWCA"). Pet. App. A at 2a. The New York Court of Appeals relied on this Court's decision in *Stewart v. Dutra Constr. Co.*,

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[2] *E.g., Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1995).

[3] Section 905(b) of the LHWCA allows certain land-based maritime workers to bring a negligence action against a "vessel".

543 U.S. 481 (2005) in determining that the floating structure was "practically capable" of maritime navigation and therefore was a vessel such that the LHWCA would apply to the Petitioner's claim. Pet. App. A 7a-8a. The *Stewart v. Dutra* "vessel status" test as applied by the New York Court of Appeals was similar to the application of that test employed by the U.S. Court of Appeals for the Eleventh Circuit and contrasts with that of the U.S. Courts of Appeals for the Fifth and Seventh Circuits.

The conflict created by these cases related to the "vessel status" test creates substantial uncertainty for maritime entities, and those who advise them, about what standards and rules apply to floating structures. Specifically, the Circuits are split on the issue of whether or not the intent of the owner of the structure is relevant to the determination of vessel status. The uncertainty created by these conflicting decisions will serve to both promote and prolong litigation of this issue. Therefore, the Court should grant certiorari to resolve the uncertainty and to promote uniformity in the application of the general maritime law.

ARGUMENT

I. THE CONFLICT OVER THE APPLICATION OF THE VESSEL STATUS TEST IN *STEWART v. DUTRA* CREATES UNDESIRABLE UNCERTAINTY FOR MARITIME ENTITIES AND THOSE WHO ADVISE THEM

The New York Court of Appeals ruled[4] that a floating power plant on which the Petitioner was injured was a vessel in navigation for purposes of section 905(b) of the LHWCA. Pet. App. A at 2a. The New York Court of Appeals' ruling confirmed a split amongst the Circuits as to the proper factors to consider in making a determination of whether a structure is a vessel under maritime statutory regimes and the general maritime law.[5]

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[4] The MLA takes no position on the correctness or incorrectness of the opinion which Petitioner seeks this Court to review.

[5] "The definition of a 'vessel' is important in many different contexts of admiralty and maritime law. Vessel status is important in determining jurisdiction since acts that occur aboard a vessel will be presumed, absent unusual circumstances, to meet the maritime relationship requirement. Furthermore, under the Admiralty Extension Act, [46 U.S.C. § 30101], land-based damages are within the jurisdiction if 'caused by a vessel.' The existence of a vessel also may be necessary for the assertion of a salvage award, liability for unseaworthiness, or a maritime lien under the general maritime law. The applicability of several statutes,

The test applied by the New York Court of Appeals is in line with that of the Eleventh Circuit and differs from the test applied by the Fifth and Seventh Circuits.

The New York Court of Appeals' ruling relied on this Court's analysis in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005) in finding that because a floating power plant had been moved in the past to provide electricity to other locations, that the structure was "practically capable of being used as a means of transportation on water" and therefore was a vessel in navigation within the meaning of the LHWCA. Pet. App. A at 7a-8a.

The decision by the New York Court of Appeals is similar to the analysis of the Court of Appeals for the Eleventh Circuit in the case of *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008). In *M/V Belle of Orleans*, the Eleventh Circuit relied on a floating casino's potential ability to sail on the navigable waters in its holding that the structure was a vessel for purposes of admiralty

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such as the Jones Act, [46 U.S.C. § 30104 et seq.], the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., the Limitation of Shipowners' Liability Act, [46 U.S.C. § 30501 et seq.], and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq., may depend on whether a vessel is involved." T.J. Schoenbaum, Admiralty & Maritime Law § 1-6 (2001)

jurisdiction. The Eleventh Circuit refused to consider the casino owner's intent or purpose as a relevant factor in the determination of vessel status. *M/V Belle of Orleans*, 535 F.3d at 1312. Conversely, both the Fifth and Seventh Circuit have concluded that the floating structure owner's intent as to the purpose of the structure is a highly relevant factor in the determination of vessel status under general maritime law. *Compare De La Rosa v. St. Charles Gaming Co., Inc.*, 474 F.3d 185, 187 (5th Cir. 2006) (concluding riverboat casino not a vessel due in part due to casino owners' intent to use it only as a casino) and *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012 (7th Cir. 2006) (analyzing owner intent for purposes of whether a vessel can sail again) *with M/V Belle of Orleans*, 535 F.3d at 1311-12 (determining that a court should not focus on owner intent when analyzing vessel status).

The differing legal standards employed by the varied court rulings related to vessel status has produced substantial uncertainty for vessel owners and the owners of moored shore-side floating structures on the navigable waters. The split in the Circuits also creates substantial uncertainty for those who advise the various maritime interests related to shore-side and maritime activities as the interested entities now face two legal standards which could possibly govern their conduct and operations. This

disharmony in the maritime law imposes shifting standards on conduct and legal liability which encourages needless litigation until a verdict has been rendered and appealed

All of these concerns make it appropriate for the Court to grant certiorari in this case and resolve the conflict in the Circuits regarding the application of the vessel status test.

Conclusion

The MLA respectfully requests that the Court grant certiorari.

Respectfully submitted,

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